

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

OTIS CORNISH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 02-1622-SLR
	)	
THOMAS CARROLL,	)	
Warden, and M. JANE	)	
BRADY, Attorney General	)	
of the State of	)	
Delaware,	)	
	)	
Respondents.	)	

**MEMORANDUM ORDER**

**I. INTRODUCTION**

Petitioner Otis Cornish is presently incarcerated at the Delaware Correctional Center ("D.C.C.") in Smyrna, Delaware. On November 11, 2002, petitioner filed an application for the writ of habeas corpus pursuant to 28 U.S.C. § 2254, acting pro se. (D.I. 2) In his petition, petitioner asserts one claim for ineffective assistance of counsel. (Id.)

Presently before the court is petitioner's motion for the transcription and production of non-transcribed state proceedings: jury voir dire, opening arguments, trial proceedings from June 14, 1999 through June 16, 1999. If denied, petitioner requests, as an alternative, representation by counsel, to expand the record, and permission to engage in discovery procedures. (D.I. 11) For the following reasons, the court will deny

petitioner's motion.

## **II. DISCUSSION**

### **A. State Court Transcript**

A federal district court may order, on its own motion or upon request by the petitioner, that additional portions of the transcript be furnished or transcribed. See Rule 5, 28 U.S.C. foll. § 2254. However, a habeas petitioner is not entitled to all trial transcripts as a matter of right but must demonstrate both a need for the documents and their relevance to the habeas corpus proceeding. Williams v. State, 427 F. Supp. 72, 73 (D. Del. 1976); Chavez v. Sigler, 438 F.2d 890, 894 (8<sup>th</sup> Cir. 1971) (requiring petitioner to show a "reasonably compelling need for the specific documentary evidence which he requests"). This "need and relevance" test requires the petitioner to satisfy two threshold inquiries. First, petitioner must state a constitutional claim that is not frivolous on its face. Second, petitioner must "specify with sufficient clarity those portions of the proceedings questioned so that a court can determine relevance." Hayman v. Vaughn, 1990 WL 204244, at \*2 (E.D. Pa. Dec. 7, 1990).

Petitioner's ineffective assistance of counsel claim asserts that his trial counsel: 1) failed to conduct a pre-trial investigation; 2) failed to procure witnesses; 3) failed to review physical evidence; and 4) induced him to plead guilty.

(D.I. 2) Without commenting on the merits of the claim, the court notes that petitioner's ineffective assistance of counsel claim is not frivolous. See Roach v. Bennett, 392 F.2d 743, 748 (8<sup>th</sup> Cir. 1968) (asking whether the face of the petition indicates the claims are frivolous); cf. Nietzke v. Williams, 490 U.S. 319, 325 (1989) (defining a frivolous complaint under § 1983 as one containing "inarguable legal conclusions" or "fanciful factual allegations"). However, although petitioner identifies specific records, he fails to satisfy the "need and relevance" test. Petitioner states that "without the benefit of the trial transcript . . . attempting to prove his claims is like 'trying to find a needle in a haystack.'" (D.I. 11) This reason does not constitute a justifiable need. Moreover, the requested transcripts are not relevant to the issue presented, especially in light of the fact that the court does have copies of relevant records such as the plea colloquy and attorney affidavits.

In short, petitioner has failed to satisfy the "need and relevance" test. Therefore, petitioner's motion for the transcription of these records is denied.

#### **B. Discovery and Expansion of the Record**

Discovery is available in habeas corpus proceedings at the discretion of the court for "good cause" shown. See Rule 6, 28 U.S.C. foll. 28 U.S.C. § 2254. "Good cause" is demonstrated when a petitioner establishes a prima facie claim for relief, and a

petitioner's claims are specific, not merely speculative or conclusory. Murphy v. Johnson, 205 F.3d 809 (5<sup>th</sup> Cir. 2000). In order to establish "good cause," a petitioner must "point to specific evidence that might be discovered that would support a constitutional claim." Marshall v. Hendricks, 103 F.Supp.2d 749, 760 (D.N.J. 2000), rev'd in part on other grounds, 307 F.3d 36 (3d Cir. 2002) (citing Deputy v. Taylor, 19 F.3d 1485, 1493 (3d Cir. 1994)).

One method of discovery a district court might permit is the expansion of the record. See Rule 7, 28 U.S.C. foll. § 2254. A district court judge "may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition." Rule 7(a), 28 U.S.C. foll. § 2254. The rule further provides that the applicant should submit copies of the "letters, documents, exhibits, and affidavits proposed to be included." Rule 7(c), 28 U.S.C. foll. § 2254.

Petitioner asks the court to permit discovery and, more specifically, to order the record to be expanded. (D.I. 11) Petitioner has also included a copy of his "First Set of Interrogatories to Parties" that contain the following questions: 1) State your full name and title; 2) What was the name and address of the court where the proceedings took place? and 3) Identify whether the ruling denying the petitioner's post-

conviction [motion] was based on a careful review of the trial transcripts, specifically that trial counsel's performance was not effective at trial?

Petitioner has failed to demonstrate "good cause" for discovery. Once again, trying to avoid "looking for a needle in a haystack" does not constitute good cause, because it fails to identify with specificity the information he expects to uncover that would support his habeas claim. Further, the request to expand the record will be denied because, even assuming the last question could elicit relevant evidence, the court already possesses the trial counsels' affidavits.

Accordingly, the court denies petitioner's motion for discovery and to expand the record.

### **C. Representation by Counsel**

It is well established that there is no automatic constitutional right to counsel for a pro se litigant in a federal habeas proceeding. See Coleman v. Thompson, 501 U.S. 722, 752 (1991); Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991); United States v. Roberson, 194 F.3d 408, 415 n.5 (3d Cir. 1999). It is well within the court's discretion, however, to seek representation by counsel for a petitioner, but this effort is made only "upon a showing of special circumstances indicating the likelihood of substantial prejudice to [petitioner] resulting . . . from [petitioner's] probable inability without such

assistance to present the facts and legal issues to the court in a complex but arguably meritorious case.” Tabron v. Grace, 6 F.3d 147, 154 (3d Cir. 1993) (citing Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984); 18 U.S.C. § 3006A (a) (2) (B) (West 2003) (representation by counsel may be provided when a court determines that the “interests of justice so require”).

Petitioner is seeking representation by counsel under 18 U.S.C. § 3006A(g) to “effectively utilize discovery procedures to inquire into his claim for the transcripts in a more clear manner.” (D.I. 11) As previously discussed, the court denied his motion for discovery. Accordingly, the request for representation by counsel is denied as moot.

Even if petitioner is seeking representation by counsel for more than to “effectively utilize” discovery, the court denies this request. Having reviewed petitioner’s record and state filings, the court concludes that he is capable of formulating issues and preparing court filings. Moreover, petitioner’s allegations are not of such a complex nature that representation by counsel is warranted at this time.

Nevertheless, as the case proceeds, the complexity of the factual issues or the need for additional legal briefing may require representation by counsel at a later date. See Tabron, 6 F.3d at 156 (recognizing that, under § 1915, the court may sua sponte seek representation for a litigant at “any point in the

litigation"). The court is willing to revisit this issue either sua sponte or upon proper motion should it subsequently appear that petitioner's claims are meritorious and that representation by counsel is necessary to afford the petitioner a full and fair opportunity to litigate his case.

In short, the court concludes that representation by counsel is not appropriate at this time. Accordingly, petitioner's motion seeking representation by counsel is denied without prejudice to renew.

### **III. CONCLUSION**

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Petitioner Otis Cornish's motion for the transcription of state court transcripts (D.I. 11) is DENIED.
2. Petitioner Otis Cornish's alternative motion for discovery and to expand the record to (D.I. 11) is DENIED.
3. Petitioner Otis Cornish's alternative motion for representation by counsel in order to engage in discovery (D.I. 11) is DENIED without prejudice to renew.

Dated: August 29, 2003

Sue L. Robinson  
UNITED STATES DISTRICT JUDGE